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Beyond the Torrens Mirror: A Framework of the In Personam Exception to Indefeasibility

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BEYOND THE TORRENS MIRROR: A FRAMEWORK OF THE IN PERSONAM EXCEPTION TO INDEFEASIBILITY

TANG HANG WU*

[One of the central tenets of the Torrens system is that the registered proprietor is conferred indefeasible title. Indefeasibility of title is subject to an in personam exception. The content of the in personam exception to indefeasibility has been a source of debate in many Torrens jurisdictions. The purpose of this article is to map out a theoretical structure to analyse the ambit of the in personam exception so as to provide a principled development of the law in this area. This article will also attempt to explain how this proposed theoretical structure of the in personam exception deals with constructive trust claims, knowing receipt, undue influence, unconscionable dealing, duress and certain restitutionary claims.]

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I INTRODUCTION

The central feature of the Torrens system of land registration is the principle that the registered proprietor has 'indefeasible title'.[1] Every land lawyer knows that 'indefeasible title' is shorthand for the notion that a registered proprietor's

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[1] This has been described as the 'foundation of the Torrens system': *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 613 (Mason CJ and Dawson J) ('*Bahr*'). See also Matthew Harding, '*Barnes v Addy* Claims and the Indefeasibility of Torrens Title' (2007) 31 *Melbourne University Law Review* 343. For a fascinating background of the Torrens system, see P Moerlin Fox, 'The Story behind the Torrens System' (1950) 23 *Australian Law Journal* 489. See also Mary-Anne Hughson, Marcia Neave and Pamela O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders' (1997) 21 *Melbourne University Law Review* 460; Lynden Griggs, 'Torrens Title — Arise the Registered and Unregistered, Befall the Legal and Equitable' (1997–98) 4(1) *Deakin Law Review* 35.

title is paramount — it cannot be defeated by a prior unregistered interest (except in certain categories prescribed by statute).[2] In the memorable words of Edwards J in *Fels v Knowles*: 'The cardinal principle … is that the register is everything'.[3] By conferring on the registered proprietor an indefeasible right to the land, the Torrens land regime 'save[s] persons dealing with [the] registered proprietor from the trouble and expense of going behind the register, in order to investigate the history of their author's title'.[4] As such, the Torrens system is said to enshrine the 'mirror principle' — the register effectively reflects all interests affecting the land.[5]

However, the Torrens philosophy that the 'register is everything'[6] is inevitably subject to certain qualifications. Apart from the statutory exceptions to indefeasibility, there are also non-statutory exceptions which are collectively known as the 'in personam' or 'personal equities' exception.[7] The existence of the in personam exception was clearly enunciated by Lord Wilberforce in the Privy Council (on appeal from the New Zealand Court of Appeal) in the case of *Frazer v Walker*, where his Lordship said 'that [the] principle [of indefeasibility of title] in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant.'[8] Similarly, Barwick CJ observed in *Breskvar v Wall*:

> Proceedings may of course be brought against the registered proprietor by the persons … setting up matters depending upon the acts of the registered proprietor himself. These may have as their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration and endorsement of the certificate of title …[9]

While the existence of an in personam exception is uncontroversial, what is unclear and has been a source of fertile debate is the precise content of the in personam exception.[10] Besides a valid contractual obligation freely entered into by the registered proprietor, what other personal claims may be brought against them? The purpose of this article is to map out a theoretical structure to analyse the ambit of the in personam exception that is consistent with the Torrens system

2 See Sir Anthony Mason, 'Indefeasibility — Logic or Legend?' in David Grinlinton (ed), *Torrens in the Twenty-First Century* (2003) 3, 4–5.

3 (1906) 26 NZLR 604, 620 (Edwards J for Denniston, Edwards, Cooper and Chapman JJ).

4 *Gibbs v Messer* [1891] AC 248, 254 (Lord Watson for the Court).

5 Theodore B F Ruoff, *An Englishman Looks at the Torrens System: Being Some Provocative Essays on the Operation of the System after One Hundred Years* (1957) 7–8.

6 *Fels v Knowles* (1906) 26 NZLR 604, 620 (Edwards J for Denniston, Edwards, Cooper and Chapman JJ).

7 Many commentators have pointed out that the term 'personal equities' is somewhat of a misnomer because this category encompasses common law as well as equitable claims: see, eg, Peter Butt, *Land Law* (5th ed, 2006) 788; Barry C Crown, 'A Hard Look at *Bahr v Nicolay*' in Dora Neo, Tang Hang Wu and Michael Hor (eds), *Lives in the Law: Essays in the Honour of Peter Ellinger, Koh Kheng Lian and Tan Sook Yee* (2007) 191, 201.

8 [1967] 1 AC 569, 585. See also *Barry v Heider* (1914) 19 CLR 197; *Butler v Fairclough* (1917) 23 CLR 78, 91 (Griffith CJ); *Abigail v Lapin* [1934] AC 491, 500 (Lord Wright).

9 (1971) 126 CLR 376, 384–5.

10 See, eg, Lyn Stevens and Kerry O'Donnell, 'Indefeasibility in Decline: The In Personam Remedies' in David Grinlinton (ed), *Torrens in the Twenty-First Century* (2003) 141.

of land registration.[11] This article will also attempt to explain how this proposed theoretical structure of the in personam exception deals with constructive trust claims, knowing receipt, undue influence, unconscionable dealing, duress and certain restitutionary claims.[12]

II TWO VIEWS ON THE IN PERSONAM EXCEPTION

A *The Narrow and Wide View of the In Personam Exception*

Before setting out my framework of the in personam exception, it is helpful to sketch out the differing opinions in this area. There are basically two differing views found in the case law and academic literature on the in personam exception. One view, which I term as the 'narrow view', is that the in personam exception ought to be interpreted restrictively because it has the potential to undermine the principle of indefeasibility. Such an approach is exemplified by Lynden Griggs'[13] and Barry Crown's work.[14] For example, Griggs argues that to widen the in personam exception to indefeasibility to include claims in knowing receipt is to introduce the 'tectonic plate of equity' which will create a fault line that makes the 'foundation of [the] Torrens [system] unstable and unclear.'[15] Such a restrictive view of the in personam exception is also found in the case law and academic literature in Singapore, which adopts a Torrens system of land registration.[16] Crown argues that '[t]he notion of an "[in personam] claim" or "a personal equity" is inherently vague. Its general adoption … would pose a threat to one of the central planks of the Torrens system.'[17] This narrow approach has recently found judicial favour in the Singapore Court of Appeal in *United Overseas Bank Ltd v Bebe bte Mohammad* ('*Bebe*').[18] Chan Sek Keong CJ, after a careful examination of the legislative history and provisions of the Torrens system in Singapore,[19] held that the courts should be slow to engraft the concept of personal equities on the Singapore Torrens system.[20] In Chan Sek Keong CJ's view, the various statutory exceptions to indefeasibility found in the Singapore

11 See below Part III.

12 See below Parts IV–VII.

13 Lynden Griggs, 'The Tectonic Plate of Equity — Establishing a Fault Line in Our Torrens Landscape' (2003) 10 *Australian Property Law Journal* 78.

14 Barry C Crown, 'Equity Trumps the Torrens System: *Ho Kon Kim v Lim Gek Kim Betsy*' [2002] *Singapore Journal of Legal Studies* 409.

15 Griggs, 'The Tectonic Plate of Equity', above n 13, 82. See also Lynden Griggs, 'In Personam, *Garcia v NAB* and the Torrens System — Are They Reconcilable?' (2001) 1 *Queensland University of Technology Law and Justice Journal* 76.

16 *Land Titles Act*, cap 157, 2004 rev ed (Sing).

17 Crown, 'Equity Trumps the Torrens System', above n 14, 415 (citations omitted).

18 [2006] 4 SLR 884. For a discussion of this case, see Barry C Crown, 'Back to Basics: Indefeasibility of Title under the Torrens System' [2007] *Singapore Journal of Legal Studies* 117.

19 *Bebe* [2006] 4 SLR 884, 915–17. For a background of the Torrens system in Singapore, see John Baalman, *The Singapore Torrens System* (1961); Sook Yee Tan, *Principles of Singapore Land Law* (2nd ed, 2001) 189–99.

20 *Bebe* [2006] 4 SLR 884, 920.

Torrens statute,[21] such as fraud, forgery and contract, were more than capable of dealing with most in personam actions in common law and in equity.[22]

In contrast, the wide view of the in personam exception does not perceive any contradiction between the concept of indefeasibility and the pursuit of personal claims against the registered proprietor. An example of the wide approach is evident in the New Zealand Court of Appeal decision of *C N & N A Davies Ltd v Laughton* ('*Laughton*').[23] In that case, Thomas J, writing for the Court, was of the opinion that the in personam exception 'sits comfortably with the concept of indefeasibility. … It is essentially non-proprietary in nature. The key element is the involvement in or knowledge of the registered proprietor in the unconscionable or illegal act or omission in issue.'[24] In a similar vein, Professor Robert Chambers also argues for a wider view of the in personam exception to include unjust enrichment claims — that is, claims in duress, undue influence, mistake and the like.[25] According to Chambers, such an approach does not conflict with the overarching objective of the Torrens system.[26] Chambers draws a distinction between three-party cases and two-party situations.[27] In the former, the defendant becomes the registered proprietor by the fraud or forgery of a third party, whereas in two-party cases the property is transferred directly from the plaintiff to the defendant.[28] Chambers argues that in three-party cases the defendant obtains indefeasible title, whereas in two-party cases the plaintiff ought to be able to bring a restitutionary claim against the defendant.[29] He makes a distinction between two inquiries: (1) investigation into the quality of the vendor's title; and (2) an investigation into the validity of the transaction through which title was obtained.[30] Chambers contends that it is only the former inquiry that the Torrens system was designed to simplify.[31] If a defendant knew or ought to have

21 *Land Titles Act*, cap 157, 2004 rev ed (Sing) s 46(2).

22 *Bebe* [2006] 4 SLR 884, 920. It has been suggested that the Singapore Torrens jurisprudence is unique because the law has been statutorily codified: see, eg, Barry Crown, 'Indefeasibility of Title: Developments in Singapore' (2007) 15 *Australian Property Law Journal* 91. As such, the in personam exception may have a smaller role to play in Singapore. Ultimately, I find this argument unconvincing for a number of reasons. First, such a construction of the law would lead to a very strained interpretation of fraud and the other statutory exceptions to indefeasibility. It is not clear how in personam claims such as undue influence and resulting trust 'fit' within such a narrow interpretation of the Torrens system. Secondly, it should be pointed out that Chan Sek Keong CJ in *Bebe* [2006] 4 SLR 884, 917–20 did not totally reject the concept of the in personam exception. His Honour merely said that the courts should be slow to engraft the concept of personal equities into the Singapore Torrens system. It might very well be that if the arguments made in this article were ventilated in the Singapore Court of Appeal, the Singapore courts might accept a principled development of the in personam exception.

23 [1997] 3 NZLR 705.

24 Ibid 712.

25 Robert Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution' [1998] *Restitution Law Review* 126. For support of this argument, see Jonathan P Moore, 'Equity, Restitution and In Personam Claims under the Torrens System' (Pt 2) (1999) 73 *Australian Law Journal* 712; James Edelman and Elise Bant, *Unjust Enrichment in Australia* (2006) 352–5.

26 Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution', above n 25, 131.

27 Ibid 129.

28 Ibid 129–30.

29 Ibid 130.

30 Ibid 133–4.

31 Ibid 134.

known that the plaintiff transferred the property while operating under mistake, duress or undue influence, then the plaintiff's interest in obtaining restitution should prevail over the defendant's security of receipt.[32] Thus, Chambers proposes a rule whereby:

> A defendant who acquires a registered interest in Torrens land from a plaintiff, with notice of the facts giving rise to the plaintiff's claim for restitution of that interest ([that is,] notice that the interest is an unjust enrichment at the plaintiff's expense), should not be protected from that claim by the principle of indefeasibility.[33]

B *Reviewing the Narrow Approach to the In Personam Exception*

It is suggested that an extremely narrow approach is undesirable for a number of reasons. First, such an approach straitjackets the development of the law in many areas, especially in the context of remedies. For example, under this narrow approach to the in personam exception, a proprietary response — the declaration of a constructive trust — is not possible as a potential remedy to a claim for breach of confidence[34] or as a response to a situation where a *Pallant v Morgan*[35] equity is said to arise. To develop this argument further, it is necessary to consider the following hypothetical facts. Suppose the plaintiff and the defendant enter into confidential negotiations to acquire and jointly develop a piece of land. In breach of confidence, the defendant purchases the land concerned in their own personal capacity and becomes the registered proprietor. The plaintiff sues the defendant for breach of confidence and/or alleges that a *Pallant v Morgan* equity has arisen, and prays for a declaration of a constructive trust over that piece of land.[36] In this context, is a plea of indefeasibility of title a complete defence to a claim for a constructive trust? Under the narrow approach, a defendant who becomes a registered proprietor would be able to rely on the assertion of indefeasibility of title to defeat a prayer for a constructive trust. While it is conceded that in many Commonwealth jurisdictions the declaration of a constructive trust in respect of an abuse of confidence[37] or a *Pallant v Morgan* equity is still very much a contested issue,[38] the point is that the result of a restrictive approach to the in personam exception would be to rule out the future development of proprietary remedies for pre-existing and new causes of action.

32 Ibid.

33 Ibid.

34 See *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 ('*LAC Minerals*').

35 [1953] 1 Ch 43.

36 This scenario is based loosely on the facts of *LAC Minerals* (1989) 61 DLR (4th) 14.

37 For a critique of *LAC Minerals* (1989) 61 DLR (4th) 14, see Tang Hang Wu, 'Confidence and the Constructive Trust' (2003) 23 *Legal Studies* 135. See also Duncan Sheehan, 'Information Tracing Remedies and the Remedial Constructive Trust' [2005] *Restitution Law Review* 82; Matthew Conaglen, 'Thinking about Proprietary Remedies for Breach of Confidence' (2008) 12 *Intellectual Property Quarterly* 82.

38 See Nicholas Hopkins, 'The *Pallant v Morgan* "Equity"' [2002] *Conveyancer and Property Lawyer* 35. The *Pallant v Morgan* equity has been cited in Australia in: *Esber v Massih* [2006] NSWSC 321 (Unreported, Hall J, 26 April 2006); *Seyffer v Adamson* (2001) 10 BPR 19 349.

Another vivid example in support of the argument above is the issue of receipt of bribes by a fiduciary. How would the narrow approach to the in personam exception deal with the example of a fiduciary who accepts bribes and uses the bribes to buy land? If the decision in *Attorney-General (HK) v Reid* ('*Reid*') is correct, then a constructive trust may be declared in favour of the principal over the land acquired by a fiduciary through their ill-gotten gains.[39] However, if one takes an extremely narrow view of the in personam exception, the fiduciary who is breach of their duty technically has the defence of indefeasibility of title to a constructive trust claim. This illustration again demonstrates how a dogmatic view of indefeasibility precludes the proper development of the law. Therefore, it is suggested that the narrow approach to the in personam exception is imprudent because it limits the law's capacity to fashion appropriate remedial responses in many areas in the law of obligations to meet changing social circumstances. In the context of the development of proprietary remedies, rather than precluding the consideration of appropriate proprietary remedies with a bright line rule, it is better to have a principled and thorough inquiry into whether such remedies are justified in that particular context and whether the grant of such proprietary remedies does in fact fatally undermine the principle of indefeasibility.

The final criticism of the narrow approach to interpreting the in personam exception is that it will inevitably lead to an expansion and, ultimately, a strained construction of the concept of Torrens fraud and the other statutory exceptions to indefeasibility. For example, how would the narrow approach deal with the problem of undue influence as presented by cases such as *Garcia v National Australia Bank Ltd* ('*Garcia*')[40] or *Royal Bank of Scotland v Etridge [No 2]* ('*Etridge*')[41] where undue influence is alleged by one party (usually the wife) against another (usually the husband)? In this scenario, the wife will usually try to set aside the security given to the bank, which is a registered mortgagee. One possible solution is to say that the registered proprietor in this case (the bank) is guilty of Torrens fraud since the registered proprietor did not take the necessary steps to ensure that no undue influence had taken place. But such an analysis could be criticised as a strained extension of the concept of Torrens fraud. As Bryan rightly observes, it would be impossible to bring many of these cases 'within the fraud exception to indefeasibility, at any rate without severe conceptual distortion.'[42] Ultimately, the same result is achieved under the narrow approach to the in personam exception by forcibly shoehorning various causes of actions into the concept of Torrens fraud and other statutory exceptions.

39 [1994] 1 AC 324. See also *Daraydon Holdings Ltd v Solland International Ltd* [2005] Ch 119. *Reid* [1994] 1 AC 324 has been followed in Australia in *Zobory v Federal Commissioner of Taxation* (1995) 64 FCR 86; *Mainland Holdings Ltd v Szady* [2002] NSWSC 699 (Unreported, Gzell J, 22 August 2002). Cf Darrel Crilley, 'A Case of Proprietary Overkill' [1999] *Restitution Law Review* 57.

40 (1998) 194 CLR 395.

41 [2002] 2 AC 773.

42 Michael Bryan, 'Recipient Liability under the Torrens System: Some Category Errors' (2007) 26 *University of Queensland Law Journal* 83, 97. See, eg, *Bebe* [2006] 4 SLR 884, 913, where Chan Sek Keong CJ, delivering the judgment of the Singapore Court of Appeal, opined that fraud could be imputed on facts similar to *Bahr* (1988) 164 CLR 604.

C *Reviewing the Wide Approach to the In Personam Exception*

The wide approach to the in personam exception, as currently articulated, is far from satisfactory. Recall that Thomas J said in *Laughton* that the key element to in personam liability 'is involvement or *knowledge* of … [an] unconscionable or illegal act'.[43] The latter limb of Thomas J's test — mere knowledge on the registered proprietor's part — is almost certainly too wide to be utilised as a guiding principle in relation to the in personam exception. This formulation is inconsistent with the hallowed Torrens principle of absolving the registered proprietor from liability based on actual or constructive notice.[44] It is interesting to note that Chambers has apparently modified his view expressed in the *Restitution Law Review*.[45] In his new edition of *An Introduction to Property Law in Australia*, Chambers now makes a distinction between rights consistent with indefeasibility and rights that detract from indefeasibility.[46] In the former category, Chambers gives the example of a settlor who transfers property to the defendant to hold on trust for the settlor's family.[47] The trust fails for some reason. Chambers argues that in this case, there should not be any problem in saying that the registered proprietor holds the property on resulting trust for the settlor. The resulting trust does not interfere with the indefeasibility of the legal title transferred by the settlor.[48] Chambers concedes that, in some cases, the right to restitution 'appears to be a direct assault on the principle of indefeasibility.'[49] He notes that 'the courts have not yet resolved this conflict satisfactorily.'[50]

Chambers's earlier thesis mooted in his article in the *Restitution Law Review* — that in a two-party situation an unjust enrichment claim may be brought against the registered proprietor who has notice that the interest transferred is an unjust enrichment at the plaintiff's expense — is too broad to be used as a general principle.[51] Chambers's strategy of imposing liability on the defendant based on the defendant's notice of facts giving rise to the plaintiff's claim for restitution is unworkable because such an analysis flies too close to the wind of constructive notice. Needless to say, the doctrine of constructive notice is inconsistent with Torrens jurisprudence. Chambers's new argument found in his textbook which distinguishes between rights consistent with indefeasibility and rights that detract from indefeasibility appears to be a more promising analysis. Unfortunately, Chambers does not develop this argument fully and does not

43 [1997] 3 NZLR 705, 712 (emphasis added).
44 See, eg, *Real Property Act 1900* (NSW) s 43(1).
45 See above Part II(A).
46 Robert Chambers, *An Introduction to Property Law in Australia* (2nd ed, 2008) 468–70.
47 Ibid 468.
48 Ibid.
49 Ibid.
50 Ibid.
51 There is some dispute as to whether Australian jurisprudence accepts an all-embracing theory of unjust enrichment. Some scepticism with the unjust enrichment principle was expressed by Gummow J in *Roxborough v Rothmans of Pall Mall Australia* (2001) 208 CLR 516, 543–5. See also Ben Kremer, 'Restitution and Unconscientiousness: Another View' (2003) 119 *Law Quarterly Review* 188; Joachim Dietrich, 'Giving Content to General Concepts' (2005) 29 *Melbourne University Law Review* 218, 230–4.

explain why certain rights that apparently detract from the principle of indefeasibility can be used to set aside a registered proprietor's title.

Chambers now seems to take the position that, save for the resulting trust example mentioned earlier, *all* restitutionary claims necessarily detract from the principle of indefeasibility. It is suggested that this view is not entirely correct. *Some* restitutionary claims *do* weaken the principle of indefeasibility in substance. These claims should therefore usually be precluded. But it is my contention that not *all* restitutionary claims (and other personal claims) have the same effect. The challenge is then to differentiate between personal claims which do detract from the principle of indefeasibility and those that do not. This will be tackled below in Part III. In certain instances, such as the *Garcia* or *Etridge* scenario where a claim of undue influence is alleged against the husband to set aside the security against the bank, the claim *does* in fact undermine the principle of indefeasibility of title. However, in these cases the social utility of allowing such claims is greater than that of upholding the Torrens philosophy of indefeasibility. This point will also be developed below in Part III.

III A Framework of the In Personam Exception

Before sketching out the proposed framework of the in personam exception, it is helpful to clear some of the ground with regard to the confusing terminology used in this context. The category of permitted causes of action against the registered proprietor has sometimes been termed as the 'in personam' exception[52] or the 'personal equities' exception.[53] However, both terms are a misnomer because these causes of action are not really exceptions to the principle of indefeasibility. The idea of indefeasibility of title does not necessarily preclude *personal* actions being brought against the registered proprietor based on their conduct. Nevertheless, it is probably the case that these terms have been used both in the case law and in academic commentaries for too long for them to be totally abandoned. Between these two terms, it is suggested that the nomenclature personal equities is more misleading than the term 'in personam exception'. Any long-suffering land law teacher will know that newcomers to the field are apt to confuse the term 'personal equities' with the concept of mere equities.[54] This will then lead to the misconception that only equitable actions may be brought against the registered proprietor.[55] As such, the term 'in personam exception' is used in this article.

Unfortunately, the term 'in personam exception' is also not totally free from ambiguity. A frequent source of confusion to a beginner is whether a personal claim with a proprietary consequence may be brought against the registered

[52] *Frazer v Walker* [1967] 1 AC 569, 585 (Lord Wilberforce for the Court); *Oh Hiam v Tham Kong* (1980) 2 BPR 9 451, 9 454 (Lord Russell).

[53] *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ).

[54] Bryan, 'Recipient Liability under the Torrens System', above n 42, 96. See also Diane Skapinker, 'Equitable Interests, Mere Equities, "Personal" Equities and "Personal Equities" — Distinctions with a Difference' (1994) 68 *Australian Law Journal* 593.

[55] See Butt, *Land Law*, above n 7, 788; Janice Gray et al, *Property Law in New South Wales* (2nd ed, 2007) 308.

proprietor.[56] It is possible to work out the answer to this question on first principles. The use of the term 'in personam' was probably meant to distinguish such a cause of action from an 'in rem' action.[57] As Dr Robinson reminds us, the distinction between the two actions is that '[a] right in personam could only be enforced against the person creating it but a right in rem was enforceable against the whole world (including the creator).'[58] In the context of the Torrens system, the old rules pertaining to most in rem actions have been displaced by statutory provisions. There appears to be prima facie no conceptual difficulty (save for some exceptions which will be articulated below in this Part) to bring an in personam claim with a proprietary relief against the registered proprietor if the claim arises from the registered proprietor's conduct. An ubiquitous example is a situation where the registered proprietor enters into a specifically enforceable contract of sale with the defendant. In this case, the defendant's right of specific performance falls within the in personam exception.[59]

The salient features of the proposed framework of the in personam exception are as follows:

1 The prima facie position is that personal claims *may* be brought against the registered proprietor *unless* such claims directly or indirectly undermine the principle of indefeasibility of title.[60]

2 The claims which are brought against the registered proprietor must, in most cases, be a known claim either in law or equity.[61] This requirement does not mean that the courts are forever precluded from developing new causes of actions or proprietary responses to meet changing social needs with respect to Torrens land. However, such novel causes of action or proprietary responses must be principled, supported by precedent and not dependent on vague notions of unconscionability.

3 The personal claims brought against the registered proprietor must arise from the personal conduct of the registered proprietor.[62] Moreover, such conduct must amount to *something more* than merely becoming the new registered proprietor.[63]

56 See Elizabeth Cooke and Pamela O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 *Law Quarterly Review* 640, 649.

57 See Andrew Tipping, 'Commentary on Sir Anthony Mason's Address' in David Grinlinton (ed), *Torrens in the Twenty-First Century* (2003) 21, 23.

58 S Robinson, 'Claims In Personam in the Torrens System: Some General Principles' (1993) 67 *Australian Law Journal* 355, 355 (citations omitted).

59 See *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ).

60 *Vassos v State Bank of South Australia* [1993] 2 VR 316 ('*Vassos*').

61 See, eg, *Grgic v Australian & New Zealand Banking Group Ltd* (1994) 33 NSWLR 202, 222–3 (Powell JA) ('*Grgic*'); *Garofano v Reliance Finance Corporation Pty Ltd* (1992) NSW ConvR ¶55-640, 59 662–3 (Meagher JA) ('*Garofano*').

62 See, eg, *Breskvar v Wall* (1971) 126 CLR 376, 384–5 (Barwick CJ); *Bahr* (1988) 164 CLR 604, 613 (Mason CJ and Dawson J), 638 (Wilson and Toohey JJ), 653 (Brennan J).

63 Skapinker, above n 54, 597. It has been suggested to me that there must be some form of *wrongdoing* on the part of the registered proprietor before a personal claim may be brought. This suggestion is correct in most cases. However, in some situations such as in *Allcard v Skinner* (1887) 36 Ch D 145 where there is a case for actionable undue influence, it is not entirely clear whether the defendant may be characterised as a wrongdoer. Despite absence of wrongdoing, it

4 Something more than 'the bare fact of forgery (and thus an absence of assent) must be shown to found any in personam action'.[64]

5 In most cases, the personal claim against the registered proprietor does not affect the title of the registered proprietor. Instead, if the claim succeeds the registered proprietor would have to compensate the plaintiff in monetary terms. However, the registered proprietor's title may be affected in respect of certain claims against them where the plaintiff is entitled to either a remedy of specific performance or a declaration of a constructive trust.[65]

6 The personal claim brought against the registered proprietor must not undermine the principle of indefeasibility of title *in substance*. This is essentially a question of fact. If the registered proprietor has done no more than register their title, then no personal claim ought to succeed against them.

7 In very limited cases, the personal claim is allowed against the registered proprietor even though it *does* detract from the principle of indefeasibility. These are instances where the personal claim protects an extremely compelling private law interest which overrides the policy of certainty in land transactions. An example of this is the case involving vulnerable persons in a familial relationship who provide security to a bank in favour of their partners. However, courts should be extremely wary in expanding this category of personal claims because these claims have the potential to destabilise the Torrens system.

There are a few important qualifications to the proposed framework of the in personam exception. First, it is suggested that the courts should move away from analysing the in personam exception using the language of unconscionability. For example, Hayne J in *Vassos v State Bank of South Australia* ('*Vassos*') said that in personam remedies are 'a clear reference to the remedies being available in circumstances where equity would act, ie, in cases which equity would classify as unconscionable or unconscientious.'[66] This analysis, which is premised on unconscionability, appears to have been endorsed by subsequent decisions in Australia[67] and New Zealand.[68] But as McMurdo J correctly points out in *White v Tomasel*, the use of the criterion of unconscionability should not be understood as requiring an element of unconscientiousness in *every* in personam exception claim.[69] Otherwise, 'the rights of a purchaser under an uncompleted contract for the sale of a registered interest would not be enforce-

is suggested that if the novice nun in *Allcard v Skinner* (1887) 36 Ch D 145 had transferred registered land to the Mother Superior in circumstances of undue influence, the transaction should have been set aside.

64 *Vassos* [1993] 2 VR 316, 333 (Hayne J).

65 *Breskvar v Wall* (1971) 126 CLR 376, 384–5 (Barwick CJ).

66 [1993] 2 VR 316, 333.

67 See *Story v Advance Bank Australia Ltd* (1993) 31 NSWLR 722; *Grgic* (1994) 33 NSWLR 202, 217 (Powell JA); *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, 162 (Ashley AJA) ('*Sixty-Fourth Throne*'); *LHK Nominees Pty Ltd v Kenworthy* [2002] 26 WAR 517, 552 (Murray J) ('*LHK Nominees*').

68 *Laughton* [1997] 3 NZLR 705; *Duncan v McDonald* [1997] 3 NZLR 669, 682 (Blanchard J for the Court).

69 [2004] 2 Qd R 438, 455–6.

able' because a contractual obligation does not depend on the proof of unconscientious behaviour.[70] Thus, Lyria Bennett Moses is right to argue that the requirement of unconscionability probably does not add very much to the analysis of the in personam exception.[71] I would go even further than Moses and argue that the requirement of unconscientiousness is apt to mislead and should be abandoned in the context of the in personam exception.[72] This requirement seems to imply that the court has an inherent jurisdiction to create an exception to indefeasibility when it feels that the conduct of the registered proprietor is unconscientious. But as Justice Gummow, writing extra-judicially, has said: 'the use of the terms "unconscionable" and "unconscientious", without more, cannot supply an equity to relief where otherwise none exists.'[73] It is hard to disagree with Jonathan Moore, who argues that:

> A vague and amorphous concept such as unconscionability would, if sufficient on its own to defeat a registered interest in land, drive a horse and buggy through the Torrens system. This is precisely the reason why the courts have insisted that a personal equity must be founded upon a recognised legal or equitable cause of action.[74]

When analysing the in personam exception, it is also important to finally abandon any reliance on the much criticised case of *Mercantile Mutual Life Assurance Co Ltd v Gosper* ('*Gosper*').[75] In *Gosper*, the registered proprietor, Mrs Gosper, had a pre-existing mortgage with Mercantile Mutual Life Assurance Co Ltd ('Mercantile').[76] Mr Gosper fraudulently caused a variation of the mortgage with Mercantile for an additional amount by forging Mrs Gosper's signature.[77] Mercantile dealt exclusively with Mr Gosper and solicitors who purported to act for Mrs Gosper on the matter of the variation of the mortgage.[78] The variation was duly registered. Subsequently, Mrs Gosper brought proceedings for the register to be rectified. Mahoney JA, with Kirby P agreeing,[79] held that a personal equity had arisen against Mercantile because Mercantile had produced the certificate of title in its possession to the New South Wales

70 Ibid 456 (McMurdo J).

71 Lyria Bennett Moses, 'Recipient Liability and Torrens Title' (2006) 1 *Journal of Equity* 135, 139.

72 However, it is not suggested that established causes of action in equity which involve the umbrella principle of unconscionability are not within the in personam exception. Such equitable actions which can be construed to be within the in personam exception include proprietary estoppel, unconscionable dealings and mistake as exemplified by *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 and *Minister for Education and Training v Canham* (2004) NSW ConvR ¶56–080.

73 W M C Gummow, 'Equity and the Torrens System Register' in David Grinlinton (ed), *Torrens in the Twenty-First Century* (2003) 51, 51 (citations omitted).

74 Jonathan P Moore, 'Equity, Restitution and In Personam Claims under the Torrens System' (Pt 1) (1998) 72 *Australian Law Journal* 258, 260.

75 (1991) 25 NSWLR 32. For a discussion of this case, see David Sonter, '*Mercantile Mutual Life Assurance Co Ltd v Gosper*' (1992) 15 *University of New South Wales Law Journal* 546; Peter Butt, 'Indefeasibility and Sleights of Hand' (1992) 66 *Australian Law Journal* 596.

76 (1991) 25 NSWLR 32, 39 (Mahoney JA).

77 Ibid.

78 Ibid 50 (Meagher JA).

79 Ibid 37–8. Meagher JA dissented: at 50–3.

Registrar-General to obtain registration of the variation.[80] This, it was held, was an unauthorised use of the certificate and hence gave rise to the personal equity against Mercantile.[81] The time has come to finally acknowledge that the reasoning in *Gosper* is simply wrong.[82] *Gosper* is inconsistent with the basic principle that in order to invoke the in personam exception, the plaintiff has to demonstrate that they have a recognised legal or equitable cause of action — an unauthorised use by the mortgagee of the certificate of title is not a recognised legal or equitable cause of action. However, the result reached in *Gosper* is probably correct, although the reasoning of the case is suspect. If the facts of this case were to arise today, it is most likely that Mrs Gosper would have pleaded and succeeded in obtaining relief under the doctrine of *Garcia*.[83] Be that as it may, it is time for the courts to explicitly reject the reasoning in *Gosper* because the manner in which Mahoney JA approached the in personam exception, in the words of a leading commentator, 'undermines confidence in the Torrens [system].'[84]

Another important point to note is that if the defendant became a registered proprietor pursuant to a contract with the plaintiff, the defendant's title may be subject to attack if the plaintiff can show that the contract can be set aside due to the presence of a vitiating factor.[85] This proposition follows from the reasoning that indefeasibility of title does not preclude a person from enforcing a valid contract against a registered proprietor. The symmetrical position must also be true: a registered proprietor's indefeasibility of title should not be a defence if the plaintiff can show the presence of a vitiating factor in the underlying contract which gave rise to the transfer of title. Thus, the plaintiff is not precluded from setting aside the defendant's title or receiving damages on recognised contractual grounds such as misrepresentation, mistake,[86] duress, unconscionable dealing and undue influence. However, not all vitiating factors may be asserted against the defendant. It has been held that lack of capacity on the part of the transferor which was unknown to the registered proprietor does not impeach their title.[87] With regard to the plea of non est factum, there appear to be conflicting authorities on whether an assertion of indefeasibility prevails over this defence.[88] On

80 Ibid 48–9.

81 Ibid.

82 Crown, 'A Hard Look at *Bahr v Nicolay*', above n 7, 202, 203.

83 (1998) 194 CLR 395. See generally L G Tyler, P W Young and C E Croft, *Fisher and Lightwood's Law of Mortgages* (2nd ed, 2005) 347–52; Andrew Phang and Hans Tjio, 'From Mythical Equities to Substantive Doctrines — *Yerkey* in the Shadow of Notice and Unconscionability' (1999) 14 *Journal of Contract Law* 72.

84 Butt, 'Indefeasibility and Sleights of Hand', above n 75, 597.

85 See L L Stevens, 'The In Personam Exceptions to the Principle of Indefeasibility' (1969) 1(2) *Auckland University Law Review* 29, 32–7.

86 See, eg, *Lukacs v Wood* (1978) 19 SASR 520; *Oh Hiam v Tham Kong* (1980) 2 BPR 9 451; *Minister for Education and Training v Canham* (2004) NSW ConvR ¶56-080. See also Lynden Griggs, 'Indefeasibility and Mistake — The Utilitarianism of Torrens' (2003) 10 *Australian Property Law Journal* 108.

87 *Horvath v Commonwealth Bank of Australia* [1999] 1 VR 643.

88 For judicial suggestions that indefeasibility prevails over a plea of non est factum, see *Grosvenor Mortgage Management Pty Ltd v Younan Permanent Trustee Australia Ltd* (Unreported, Supreme Court of New South Wales, Young J, 23 August 1990); *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643, 675–83 (Giles J). Cf *Perpetual Trustees Victoria Ltd v Ford* [2008]

principle, it is suggested that non est factum cannot defeat a registered proprietor's indefeasible title. Otherwise, this will introduce an indefensible distinction between the *Frazer v Walker* situation and a case where non est factum is alleged. It would be strange to say that the previous registered proprietor may lose their land due to a third party's forgery which caused the land to be registered in another's name, but is able to stave off a claim where their own act (albeit one vitiated by non est factum) was the causative event which led to the later registration. It also follows that where there is no contract between the plaintiff and the defendant — for example, where the defendant becomes the registered proprietor as a result of a forgery by a third party rogue — a restitutionary claim based on mistake or failure of consideration cannot be brought against the defendant. This is because such a restitutionary claim will undermine, in substance, the principle of immediate indefeasibility conferred on a registered proprietor. This latter point is developed below in Part VII, which discusses restitutionary claims.

IV CONSTRUCTIVE TRUST

One of the most difficult issues in Torrens jurisprudence that remains unresolved is whether a prayer for a declaration of a constructive trust may be brought against the registered proprietor as part of the in personam exception. As with any discussion on the constructive trust, it is important to be clear from the outset about the terminology used in order to avoid unnecessary confusion.[89] The term 'constructive trust' can be utilised in two ways. Used in a proprietary sense, the defendant is declared constructively by the court to be the trustee of the property for the defendant — the constructive trust has a proprietary significance since the defendant is actually ordered to hold property for the benefit of the claimant. In contrast, the term 'constructive trust' has sometimes been used to describe a form of relief which is personal in nature. An example of this is when the defendant is ordered to be liable to account as a constructive trustee. When the term constructive trust is used in this second sense, the remedy is personal in nature.[90] Such liability to account as a constructive trustee might arise when the defendant is guilty of an equitable wrong, for example: (1) where the defendant intermeddles and voluntarily assumes the mantle of trusteeship;[91] and (2) where the defendant dishonestly assists in a breach of trust.[92] Such personal claims *are* part of the in personam exception. If the registered proprietor was personally guilty of wrongdoing, it is hard to see why the principle of indefeasibility should protect them from such wrongdoing.

NSWSC 29 (Unreported, Harrison J, 1 February 2008) [61]–[84], [109], where it was held that the indefeasible interest was avoided by reason of non est factum.

89 See Lionel Smith, 'Constructive Trusts and Constructive Trustees' (1999) 58 *Cambridge Law Journal* 294; Tang, 'Confidence and the Constructive Trust', above n 37, 137–8. See also Lawbook Company, *Principles of the Law of Trusts*, vol 2 (at 47) [22 000]. Bryan is responsible for the chapter on constructive trusts in *Principles of the Law of Trusts*: at ch 22.

90 See *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 404–5 (Lord Millett); *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400, 408–10 (Millett LJ).

91 For an overview of the law in this area, see Lawbook Company, above n 89, [22 910].

92 Ibid [22 680]–[22 710].

The rest of this Part considers constructive trust claims used in the proprietary sense. Proprietary claims are more difficult to analyse because they do prima facie undermine the principle of indefeasibility — a successful prosecution of these claims will result in the registered proprietor being declared as the trustee for the plaintiff. As such, constructive trust claims directly affect the title of the registered proprietor. However, as argued above in Part III, it is erroneous to assume that no claims which attract proprietary relief can be brought against the registered proprietor because it is necessarily inconsistent with the principle of indefeasibility.

The difficulty with analysing constructive trust claims is compounded by the fact that such claims may arise in a myriad of circumstances. Bryan perceptively notes that whether a claim for a constructive trust falls within the in personam exception depends on the nature of the claim.[93] According to Bryan, the declaration of a constructive trust 'must not be a claim which would subvert the principle of indefeasibility of title'.[94] Bryan correctly asserts that a constructive trust will not be declared over Torrens land simply because the defendant became the registered proprietor with constructive notice of a breach of fiduciary duty.[95] This analysis is entirely consistent with Torrens philosophy. The importation of the doctrine of constructive notice to Torrens land would severely undermine the principle of indefeasibility.

A related question to Bryan's observation is this: how should a constructive trust claim premised on a vindication of equitable title be analysed within the Torrens framework?[96] A constructive trust claim based on the assertion of an equitable title might arise in the following context.[97] Let us first assume that the original registered proprietor holds the land on an express trust for the plaintiff beneficiary. In breach of trust, the registered proprietor transfers the property to the defendant, who is a volunteer. A variation to this factual scenario might involve the tracing process. Let us now suppose a rogue trustee in breach of trust withdraws money from a trust account and purchases registered land. The rogue trustee then transfers the land to the defendant who is a volunteer. Can the plaintiff beneficiary in these two scenarios ask the court to declare that the defendant holds the property as a constructive trustee for the plaintiff? The answer to this question would depend on a careful examination of the indefeasibility provisions of the jurisdiction in which the claim is brought. In jurisdictions where indefeasibility of title is conferred only on purchasers of registered land and not volunteers,[98] the plaintiff would be entitled to bring a constructive claim against the defendant. There is no conflict between the principle of indefeasibil-

93 See ibid [22 975].
94 Ibid.
95 Ibid.
96 On vindication of equitable title, see, eg, *Foskett v McKeown* [2001] 1 AC 102. For a discussion of this case, see Tang Hang Wu, '*Foskett v McKeown* — Hard-Nosed Property Rights or Unjust Enrichment?' (2001) 25 *Melbourne University Law Review* 295.
97 See Bryan, 'Recipient Liability under the Torrens System', above n 42, 86–8.
98 For an overview of the issue of indefeasibility and volunteers, see Butt, *Land Law*, above n 7, 798–9; Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Real Property Law* (4th ed, 2007) 160–1.

ity and a constructive trust claim since the defendant is not entitled to indefeasible title because they are a volunteer. However, in jurisdictions where a registered proprietor is granted indefeasible title even if they are a volunteer, a constructive trust claim should be precluded because it is inconsistent with the principle of indefeasibility.[99] A title-based claim (albeit one premised in equity) is incompatible with the Torrens jurisprudence of immediate indefeasibility.

What then are constructive trust claims which do not undermine the principle of indefeasibility? It is suggested that constructive trust claims which arise from the wrongful conduct of the registered proprietor fall within the in personam exception.[100] However, the registered proprietor's conduct must amount to *something more* than merely becoming the new registered proprietor with notice of a prior unregistered interest. A simple illustration may be used to demonstrate this point. Suppose X is the registered proprietor of Greenacre. X makes certain representations to Y and, what is more, Y relies on these statements to Y's detriment. Let us assume that a court has adjudicated that the best way to satisfy Y's equity which arises from a claim for proprietary estoppel against X is to declare a constructive trust whereby X holds Greenacre on trust for Y. Does X, as the registered proprietor, have a defence of indefeasibility of title to a declaration of a constructive trust in this context? The answer is no. Indefeasibility of title does not provide X with the immunity to engage in unconscionable conduct vis-a-vis Y which would amount to a valid proprietary estoppel claim. It is therefore suggested that the following constructive trust claims are legitimately within the in personam exception to indefeasibility:

1 where a person acquires property in breach of fiduciary duty;
2 where an equity arises from proprietary estoppel stemming from the conduct of the registered proprietor;
3 where the registered proprietor enters into a specifically enforceable contract to dispose of the land and attempts to renege on the agreement;
4 where the registered proprietor evinces a 'common intention' to share the property in informal property arrangements and the plaintiff has relied on this common intention to their detriment; and
5 where the registered proprietor buys the property using bribes.[101]

There is the outstanding issue of the problem vis-a-vis Torrens land and the constructive trust posed by a certain factual pattern which always recurs in land law cases.[102] The recurring factual pattern can be summarised as follows: Y has rights in land belonging to R1; R1 transfers the land to R2; R2 knows of Y's rights and buys the land at a lower value. In some cases, R2 also expressly agrees to honour Y's rights. Is Y entitled to ask the court to declare that R2 holds the

99 Lawbook Company, above n 89, [22 760].
100 See Moore, 'Equity, Restitution and In Personam Claims under the Torrens System' (Pt 1), above n 74, 265.
101 For a comprehensive account of the law in these areas, see generally Lawbook Company, above n 89, ch 22.
102 See, eg, *Bahr* (1988) 164 CLR 604; *Lyus v Prowsa Developments Ltd* [1982] 2 All ER 953; *Binions v Evans* [1972] Ch 359; *Ho Kon Kim v Lim Gek Kim Betsy* [2001] 4 SLR 340.

property on constructive trust for Y? Furthermore, is such a declaration of a constructive trust precluded by R2's assertion of indefeasibility as the registered proprietor? There appear to be a few possible solutions to these questions. A majority of the High Court of Australia in *Bahr v Nicolay [No 2]* ('*Bahr*') declared a constructive trust on these facts.[103] As opposed to the analysis of the majority in *Bahr*, there are academic commentaries[104] and case law[105] which suggest that a declaration of a constructive trust analysis is not the most appropriate analysis on these facts. The argument is that liability on R2 could either be imposed via: (1) a finding of fraud on R2's part;[106] (2) a finding of an express trust where R2 holds the property on trust for Y;[107] (3) a finding of tortious liability on R2's part — namely, the tort of conspiracy;[108] or (4) a contractual liability on R2's part to honour their obligation to Y.[109] It is beyond the scope of this article to examine which of these approaches is preferable as a route to impose some sort of legal liability on R2. For the purposes of this article, it is sufficient to point out that, despite disagreement on whether a constructive trust ought to be declared in this factual pattern, there seems to be unanimity both in the case law and academic commentaries that R2 should take subject to Y's interest. As such, R2 cannot assert indefeasibility of title to defeat Y's claim. Y's in personam claim could either be rationalised on a constructive trust basis, an express trust, a tort claim or a contractual claim.

V KNOWING RECEIPT

There is uncertainty as to whether a claim in knowing receipt[110] may be maintained against a registered proprietor.[111] Before discussing in detail the controversy in this area, it is helpful to sketch out how a claim for knowing receipt might arise in the Torrens context. A rogue forges registration documents and causes trust property to be transferred to the defendant. Let us assume that the particular Torrens jurisdiction confers indefeasibility of title to the defendant in this case.[112] Is indefeasibility an absolute bar to a knowing receipt claim in this context?

103 (1988) 164 CLR 604, 638–8 (Wilson and Toohey JJ), 654–6 (Brennan J).

104 See, eg, Susan Bright, 'The Third Party's Conscience in Land Law' [2000] *Conveyancer and Property Lawyer* 398; Crown, 'Equity Trumps the Torrens System', above n 14.

105 See, eg, *Bebe* [2006] 4 SLR 884, 913, where Chan Sek Keong CJ, in a judgment for the Singapore Court of Appeal, preferred to analyse the facts as Torrens fraud.

106 Ibid.

107 Ibid. See also *Bahr* (1988) 164 CLR 604, 618–19 (Mason CJ and Dawson J).

108 Bright, above n 104, 408–13.

109 Ibid 413–18; Crown, 'Equity Trumps the Torrens System', above n 14.

110 This is sometimes known as the first limb of liability under *Barnes v Addy* (1874) LR 9 Ch App 244.

111 For a discussion of this issue in recent articles, see Moses, above n 71; Bryan, 'Recipient Liability under the Torrens System', above n 42; Harding, above n 1.

112 There could be two explanations for this. First, the facts could occur in a Torrens jurisdiction which confers indefeasibility of title to *all* registered proprietors including volunteers. Secondly, the defendant could be a purchaser.

A *The Authorities*

The authorities have not spoken with one voice on this issue. *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* ('*Sixty-Fourth Throne*')[113] is frequently cited as the main authority for the proposition that a knowing receipt claim is inconsistent with Torrens land.[114] This case involved the appellant bank extending a loan to a rogue on, inter alia, a security by way of a mortgage over property owned by the respondent company. The appellant duly registered the mortgage. It turned out that the rogue had forged the instrument of mortgage. One of the respondent's arguments was that the appellant was subject to the in personam exception for liability under knowing receipt. Tadgell JA, with Winneke P concurring[115] and Ashley AJA dissenting,[116] took the position that a defendant is not regarded as receiving trust property by registering a mortgage over Torrens land.[117] Tadgell JA reasoned that since Torrens land operates by way of a system of title by registration, a registered proprietor obtains title over the land from the act of registration of the land and not from the act of receipt from the rogue.[118] As such, the element of receipt of trust property can never be made out in respect of Torrens land. Tadgell JA also thought that to allow a claim for knowing receipt would amount to a 'back door' attack on the principle of indefeasibility.[119]

In contrast, Hansen J in *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* ('*Koorootang*') did not seem to have any problems with applying a knowing receipt analysis to Torrens land.[120] However, the authority of this case is weakened by the fact that the defendant did not seek to argue that the concept of immediate indefeasibility rendered it immune from a knowing receipt claim.[121] The Court in *Tara Shire Council v Garner* ('*Tara Shire*') also saw no contradiction between Torrens land and knowing receipt.[122] Atkinson J rejected the argument that the principle of indefeasibility precluded a claim for knowing receipt.[123] The learned judge held that the Torrens statute 'was not intended to protect a registered proprietor who had gained title by knowingly participating in a breach of trust.'[124]

It was in this state of conflicting authorities that the High Court of Australia decided *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ('*Farah Construc-*

113 [1998] 3 VR 133.
114 See, eg, Butt, *Land Law*, above n 7, 791–2.
115 *Sixty-Fourth Throne* [1998] 3 VR 133, 136.
116 Ibid 166–7.
117 Ibid 156–7. This case was cited with approval by *LHK Nominees* [2002] 26 WAR 517, 549 (Murray J), 555 (Anderson and Steytler JJ), 568–72 (Pullin J).
118 *Sixty-Fourth Throne* [1998] 3 VR 133, 156–7. See also *Disctronics Ltd v Edmonds* [2002] VSC 454 (Unreported, Warren J, 23 October 2003).
119 *Sixty-Fourth Throne* [1998] 3 VR 133, 157. See also *White v Tomasel* [2004] 2 Qd R 438.
120 [1998] 3 VR 16, 74–5, 105.
121 Ibid 75 (Hansen J).
122 [2003] 1 Qd R 556. For a discussion and critique of this case, see Peter Butt, 'Indefeasibility and "Knowing Receipt" of Trust Property' (2002) 76 *Australian Law Journal* 606; Griggs, 'The Tectonic Plate of Equity', above n 13.
123 *Tara Shire* [2003] 1 Qd R 556, 582–5.
124 Ibid 585.

tions').[125] In their Honours' unanimous joint judgment, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ extensively quoted Tadgell JA's judgment in *Sixty-Fourth Throne* with apparent approval.[126] The learned judges also opined that the lower court in *Farah Constructions* should have referred[127] to the case of *LHK Nominees Pty Ltd v Kenworthy* ('*LHK Nominees*').[128] The High Court then tersely said the lower court 'ought to have followed' *Sixty-Fourth Throne* and *LHK Nominees*.[129] Professor Peter Butt interprets this decision as settling the issue once and for all. According to Butt, 'the position now seems settled [that] conduct caught by the first limb of *Barnes v Addy* does not cause a registered title to be set aside on a right in personam basis'.[130]

B *Arguments from Principle*

There are two potential conceptual obstacles to a knowing receipt claim. First, there is some dispute as to whether a defendant actually receives trust property when they become a registered proprietor of the land. Secondly, even if the first threshold issue can be overcome, there is this background question: is a claim for knowing receipt substantively inconsistent with the principle of indefeasibility? On the first issue, Tadgell JA in *Sixty-Fourth Throne* took the position that proprietary rights under the Torrens system derive from the fact of registration and not from an event antecedent to it.[131] If this is taken to be a general principle, the element of receipt can never be made out in the context of Torrens land. With respect, this analysis is unconvincing as a general principle because it is unduly technical. Take an example of a rogue who forges registration documents and transfers land which is subject to a trust to the defendant. In this scenario, is it really realistic to say that the defendant had not received the trust property but has independently gained title by the act of registration? The registration of title by the defendant in this case is not an independent act completely divorced from the actions of the rogue. It is more accurate to characterise the transfer of the land as being *facilitated* by the actions of the rogue which had the effect of destroying the beneficiaries' rights to the land. Therefore, it is not too much of a stretch to argue that the defendant had in fact received trust property in this context. Alternatively, one can say that it is possible for the beneficiaries to use the tracing process to establish that the defendant had received trust property. The beneficiaries ought to be able to trace the value inherent in the land to the land now registered in the defendant's name.

125 (2007) 230 CLR 89. For a discussion of this case, see David Hayton, 'Lessons from Knowing Receipt Liability and Unjust Enrichment in Australia' (2007) 21 *Trust Law International* 55; Pauline Ridge and Joachim Dietrich, 'Equitable Third Party Liability' (2008) 124 *Law Quarterly Review* 26.

126 *Farah Constructions* (2007) 230 CLR 89, 169–70.

127 Ibid 171.

128 [2002] 26 WAR 517.

129 *Farah Constructions* (2007) 230 CLR 89, 171 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

130 Peter Butt, '"Knowing Receipt of Trust Property" as an Exception to Indefeasibility' (2007) 81 *Australian Law Journal* 713, 714.

131 [1998] 3 VR 133, 156–7.

Although I argue that the element of receipt of trust property can be made out, a claim for knowing receipt ought to be precluded in the context of registered land as it is in substance incompatible with the principle of indefeasibility.[132] Before developing this argument, it is necessary to briefly outline the jurisprudential basis of knowing receipt. Knowing receipt is difficult to analyse because there are several contested theoretical models which purport to explain this cause of action.[133] These models include the following:

1 Knowing receipt is an equitable wrong.[134] Actual or constructive knowledge by the recipient of the breach of trust is sufficient to impose liability on the recipient.[135]
2 Knowing receipt is premised on the concept of unconscionability. Nourse LJ in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* said that '[a]ll that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt'.[136]
3 Knowing receipt is premised upon the principle of unjust enrichment. 'It would be confined to restoring an unjust gain. Change of position would be available as a defence accordingly'.[137]
4 Knowing receipt is better viewed as equity's cousin to the common law action of conversion. In other words, it is a response to interference with the plaintiff's equitable title.[138] However, since an equitable title is always susceptible to being defeated by a bona fide purchaser for value without notice, some degree of knowledge must be present before liability attaches.

It is beyond the scope of this article to try to resolve the longstanding issue as to which of these approaches is preferable. The thesis of this article is that an action in knowing receipt is *in substance* inconsistent with the principle of

132 Cf Bryan, 'Recipient Liability under the Torrens System', above n 42, 97–8, where it is argued that a personal claim for knowing receipt ought to be technically available for Torrens land.

133 See, eg, Michael Bryan, 'The Liability of the Recipient: Restitution at Common Law or Wrongdoing in Equity' in Simone Degeling and James Edelman (eds), *Equity and Commercial Law* (2005) 327.

134 See, eg, Moses, above n 71, 141.

135 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, cited with approval in *Farah Constructions* (2007) 230 CLR 89.

136 [2001] Ch D 437, 455. Cf *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 (Lord Nicholls).

137 Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in W R Cornish et al (eds), *Restitution: Past, Present and Future — Essays in Honour of Gareth Jones* (1998) 231. See also *Koorootang* [1998] 3 VR 16, 78–105 (Hansen J); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800 (Unreported, Palmer J, 19 August 2004); James Edelman, 'A Principled Approach to Unauthorised Receipt of Trust Property' (2006) 122 *Law Quarterly Review* 174. The unjust enrichment analysis was rejected in *Farah Constructions* (2007) 230 CLR 89, 148–59 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also Brad Strahorn, 'The End of Knowing Receipt? A Riposte to Unjust Enrichment' (2006) 80 *Australian Law Journal* 765.

138 See Lionel Smith, 'W(h)ither Knowing Receipt?' (1998) 114 *Law Quarterly Review* 394; Ross Grantham and Charles E Rickett, *Enrichment and Restitution in New Zealand* (2000) 281–2. See also Lionel Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 *Law Quarterly Review* 412.

indefeasibility on *any* of these contested approaches. Take the first two formulations of the liability in knowing receipt. The principal elements of the action would be: (1) receipt of trust property for one's own use; and (2) the requisite knowledge on the recipient's part which would make the receipt wrongful or unconscionable. In other words, liability is imposed on the registered proprietor *primarily* on the basis of the state of the registered proprietor's knowledge of a prior unregistered interest (the trust or fiduciary obligation owing to the plaintiff) at the time of registration. The action of knowing receipt appears to be in direct conflict with the Torrens philosophy of absolving the registered proprietor from legal liability on the basis of notice of an unregistered interest. As Mary-Anne Hughson, Marcia Neave and Pamela O'Connor observe: 'any claim based wholly or substantially on general law doctrines of notice would conflict with the clear legislative intent expressed in the "notice" provisions.'[139] There are two counter-arguments against the thesis that knowing receipt is in substance inconsistent with the principle of indefeasibility. First, knowing receipt is merely a *personal* claim and not a *proprietary* claim. As such, it could be argued that a successful claim in knowing receipt does not affect the title of the registered proprietor.[140] Secondly, an argument could be made that Torrens statutes do not protect the registered proprietor from actions where notice of an unregistered interest is one of the elements of the cause of action. On reflection, both arguments are not convincing answers to the charge that an action in knowing receipt is in substance inconsistent with the principle of indefeasibility. Although an action in knowing receipt is merely personal in nature, one can legitimately say that such a claim, if allowed, constitutes a back door attack on the principle of indefeasibility because it erodes one of the fundamental characteristics of Torrens land — that is, knowledge of a prior interest does not import legal liability. Furthermore, it is a hollow victory for the registered proprietor to retain the land if they have to pay a sum equivalent to the value of the land in terms of equitable compensation to the defendant. The argument that Torrens statutes do not make a registered proprietor immune from claims where *one* of the elements of the cause of action is notice of an unregistered interest is also not apposite with regard to an action in knowing receipt. In the case of knowing receipt, the *primary* basis for liability is dependent on the state of the knowledge of recipient.

A knowing receipt claim is also inconsistent with Torrens philosophy even if one subscribes to the unjust enrichment analysis. To establish an unjust enrichment claim, one has to identify the 'unjust factor' — the ground of restitution in a particular case.[141] The most plausible unjust factor in this context is the ignorance of the plaintiff that the land was transferred to the defendant.[142] A moment's reflection will reveal that an unjust enrichment claim where the unjust factor is ignorance does not 'fit' within the Torrens scheme. This is because such

139 See Hughson, Neave and O'Connor, above n 1, 494.

140 This argument has been made by Harding, above n 1, 352–5.

141 See, eg, *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 (Lord Steyn).

142 On this unjust factor, see Andrew Burrows, *The Law of Restitution* (2nd ed, 2002) 182–210. Cf Graham Virgo, *The Principles of the Law of Restitution* (2nd ed, 2006) 131–6.

an unjust enrichment claim would technically be open to the original registered proprietor in the classic *Frazer v Walker* situation where the defendant becomes the new registered proprietor via forged documents.[143] Such a position is untenable because it goes against the theory of immediate indefeasibility that a registered proprietor obtains indefeasible title once they register their interest.[144] Likewise, the rationalisation that knowing receipt is better seen as a response to the interference with the plaintiff's equitable title is also inconsistent with the principle of indefeasibility of title. Under the Torrens system, once a person becomes a registered proprietor, they obtain indefeasible title and should be immune to any attack based on a third party's equitable title.

The argument above assumes that the action by the plaintiff is brought when the defendant still retains the property. Would it make a difference if the defendant had already disposed of their interest in the land? Is there an argument to be made that, once the defendant sells the land, an action in knowing receipt is not incompatible with the principle of indefeasibility? On balance, it is suggested that a knowing receipt claim ought not to be allowed even after the defendant sells the property. Otherwise, there will be an indefensible distinction between a situation where the defendant retains the land and a situation where the defendant sells the land: surely, it is a matter of fortuitous coincidence as to when the cause of action is brought against the defendant. In any case, the defendant may simply wait until the cause of action is time-barred before selling the land in order to defeat the plaintiff's claim. There does not seem to be any reason why the law should force the defendant to retain the land until the expiry of the limitation period in this situation.

Before leaving this Part, the issue of dishonest assistance and its relationship with knowing receipt should be addressed. Professor Charles Mitchell points out that it is possible for a defendant to be liable for dishonest assistance where they have received trust property.[145] Mitchell observes that in practice most plaintiffs do not sue for dishonest assistance because: (1) the plaintiff usually prefers to assert a proprietary claim based on a vindication of equitable title if the property is still in the defendant's hands;[146] and (2) knowing receipt requires a lesser degree of fault than dishonesty.[147] However, if the argument made in this Part is accepted — that is, a claim in knowing receipt is precluded in the context of Torrens land — then a plaintiff may wish to bring a claim against the defendant in dishonest assistance instead. There is no problem in fitting a dishonest assistance claim within the Torrens system because the defendant's conduct can easily be characterised as Torrens fraud.[148]

143 The defence of change of position in good faith might, however, be open if the defendant had paid the rogue trustee for the purchase of the land.

144 See *Frazer v Walker* [1967] 1 AC 569; *Garofano* (1992) NSW ConvR ¶55-640; *Vassos* [1993] 2 VR 316.

145 Charles Mitchell, 'Assistance' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (2002) 139, 182–7. See, eg, *Equiticorp Industries Group Ltd (in stat mgmt) v The Crown [No 47]* [1998] 2 NZLR 481, 539, 641 (Smellie J).

146 Mitchell, above n 145, 182.

147 Ibid 182–3.

148 *LHK Nominees* [2002] 26 WAR 517; Butt, *Land Law*, above n 7, 791–2.

VI UNDUE INFLUENCE, UNCONSCIONABLE CONDUCT AND DURESS

If a person becomes a registered proprietor by exercising undue influence over the previous registered proprietor, then the indefeasibility provisions should not be a bar to setting the transaction aside. The previous registered proprietor should be able to vitiate the transfer of land if they can demonstrate a case of actionable undue influence. Adrian Bradbrook, Susan MacCallum and Anthony Moore observe that: 'Where the transaction concerns Torrens land, and the person relying on the instrument is responsible for or involved in the vitiating factor, the in personam exception … may be used to defeat the title of the registered proprietor.'[149] Setting aside the transaction in this case does not threaten the Torrens policy of maintaining the integrity of the register. As argued above,[150] the concept of indefeasibility in Torrens land merely protects the title of the registered proprietor from an unregistered interest; it does not provide the registered proprietor with a cloak of immunity to engage in wrongful conduct such as exercising undue influence over another individual.

Matters become more complicated when the plaintiff attempts to set aside the transaction based on a factual pattern as presented in *Garcia*.[151] In *Garcia*-like cases, the plaintiff is usually the wife who is seeking to set aside a guarantee secured on the property which is given to a bank for her husband's debt. Under the *Garcia* doctrine, the wife may set aside the guarantee if: (1) she did not have an understanding of the effect of the transaction; (2) she was a volunteer — that is, she did not benefit from guaranteeing her husband's debts; (3) the bank knew of the husband and wife relationship; and (4) the bank did not explain the transaction to the wife or ensure that the wife received independent legal advice.[152] The unresolved question is this: how does the *Garcia* doctrine 'fit' in with Torrens jurisprudence? Why is the bank as a registered mortgagee not entitled to defeat the claim by asserting indefeasibility of title in this case?

There appear to be two conflicting views on whether the *Garcia* doctrine may be analysed as an in personam exception to indefeasibility. In *Sixty-Fourth Throne*, Tadgell JA, with whom Winneke P concurred, rejected an argument to set aside the mortgage on a plea based on the English decision of *Barclays Bank plc v O'Brien* ('*O'Brien*').[153] Tadgell JA rationalised the *O'Brien* doctrine as being premised on constructive notice. His Honour said quite pointedly that the doctrine of constructive notice 'would, in effect, introduce into the scheme of title by registration the notion of priority determinable by reference to the doctrine of the bona fide purchaser for value without notice, a doctrine at odds with the Torrens system.'[154] As such, Tadgell JA held that the plaintiff could not

149 Bradbrook, MacCallum and Moore, above n 98, 171.

150 See above Part IV.

151 (1998) 194 CLR 395. See generally Tyler, Young and Croft, above n 83, 347–52; Phang and Tjio, above n 83.

152 (1998) 194 CLR 395, 409 (Gaudron, McHugh, Gummow and Hayne JJ).

153 *Sixty-Fourth Throne* [1998] 3 VR 133, 146–54, referring to *Barclays Bank plc v O'Brien* [1994] 1 AC 180. Winneke P agreed in *Sixty-Fourth Throne*: at 136–7.

154 *Sixty-Fourth Throne* [1998] 3 VR 133, 152. Cf Griggs, 'In Personam, *Garcia v NAB* and the Torrens System', above n 15, 87, where it is argued that '[a]ny analysis of a case involving

raise a claim in personam to impeach the defendant's title as the registered mortgagee.[155] In contrast, Ashley AJA did not rule out the application of the *O'Brien* doctrine to Torrens land.[156] Although declining to hold that *O'Brien* applied in the present case,[157] Ashley AJA said that his Honour preferred 'a conclusion that the protection of sureties which equity affords in such a case ought not be denied by the indefeasibility principle.'[158]

It might be argued that there is a distinction between the English doctrine of *O'Brien* and the Australian counterpart in *Garcia*. The distinction can be couched as follows: under the English doctrine of undue influence the mortgage is set aside due to the constructive notice on the bank's part,[159] whereas under Australian law the ground for setting aside the transaction is premised on the unconscionable conduct of the bank. Hence, it is conceptually unobjectionable as a matter of 'fit' to apply the *Garcia* doctrine to Torrens land because *Garcia* does not utilise the notion of constructive notice. Instead, *Garcia* focuses directly on the unconscionable behaviour of the registered mortgagee. This distinction is too slender to be defensible. At the end of the day, in most situations, the result would be exactly the same whether we apply *O'Brien* or *Garcia*. If we accept the argument that there is usually no substantive difference between *O'Brien* and *Garcia*, we are still left with this question: which approach (Tadgell JA's approach[160] or Ashley AJA's analysis[161] in *Sixty-Fourth Throne*) is preferable? Ultimately, the answer boils down to a matter of policy. It cannot be denied that the *Garcia* doctrine *does* in practice affect the principle of indefeasibility. If the *Garcia* doctrine is applicable to Torrens land, a bank obtaining a mortgage cannot simply register its mortgage and assert indefeasibility of title. The bank will have to take certain steps to ensure that the wife receives independent legal advice. Thus, *Garcia* can be seen as a policy-motivated decision where the onus is placed on the bank as a gatekeeper to prevent undue influence or unconscionable conduct being perpetrated on the wife by the husband. This policy — the bank as a gatekeeper in preventing undue influence or unconscionable conduct — conflicts with the principle of conferring immediate indefeasibility on a registered proprietor. As such, the courts will have to make a decision as to which policy prevails. It is the present writer's view that the *Garcia* doctrine should *not* be construed as being incompatible with Torrens land because the social utility of the doctrine — the protection of vulnerable people in a familial situation — far outweighs the principle of indefeasibility of title.[162]

Torrens land should start from the fundamental precepts of indefeasibility of title and the irrelevancy of notice — if these are to be waived, the justification for this action must be established.'

155 *Sixty-Fourth Throne* [1998] 3 VR 133, 152–4.

156 Ibid 173.

157 Ibid.

158 Ibid.

159 *O'Brien* [1994] 1 AC 180, 195–9 (Lord Browne-Wilkinson). Cf the current reformulation of the English law of undue influence that treats these cases as 'a class of contracts which has special features of its own': *Etridge* [2002] 2 AC 773, 803 (Lord Nicholls).

160 *Sixty-Fourth Throne* [1998] 3 VR 133, 156–7.

161 Ibid 166–7.

162 For a recent attempt to rationalise this doctrine, see Mindy Chen-Wishart, 'Undue Influence: Vindicating Relationships of Influence' (2006) 59 *Current Legal Problems* 231.

The issue regarding unconscionable dealings[163] and duress is easier to analyse. In the former case, if the registered proprietor dealt with the plaintiff who was under a special disability and the disability was sufficiently evident to the registered proprietor, making the transaction prima facie unfair or unconscientious, then the plaintiff should be able maintain a personal action against the registered proprietor to set aside the transfer of the land. A similar conclusion can be reached in respect of duress. If the registered proprietor exercised actionable duress on the plaintiff, then the plaintiff should be able to set aside the transaction.

VII RESTITUTIONARY CLAIMS BASED ON MISTAKE, FAILURE OF BASIS AND IGNORANCE

Certain restitutionary claims cannot be maintained against the registered proprietor because these claims will place an intolerable strain on the principle of indefeasibility. Restitutionary claims based on mistake, failure of consideration and ignorance are such examples, especially in the context of three-party situations.[164] Otherwise, a restitutionary claim might be open against the registered proprietor in the following circumstance: A is the original registered proprietor; B, a rogue, forges A's signature and transfers the property to C; C registers the transfer of property. Under traditional Torrens jurisprudence, C obtains indefeasible title.[165] However, if such restitutionary claims are part of the in personam exception, A can bring a personal action against C on the ground that: (1) A was mistaken vis-a-vis the transfer of property; (2) there was no basis for the transfer of property — that is, failure of consideration; or (3) A was ignorant of the transfer of the property to C. This represents a back door attack on the central tenet of the principle of indefeasibility. While it is true that C might be able to stave off a restitutionary challenge by pleading the change of position defence if C had paid value for the property, the better approach is to exclude these claims on the ground that it is inconsistent with the idea of indefeasibility of title.

There are also a few reasons why it is better to preclude a restitutionary claim as a matter of policy rather than leaving it to the change of position defence to absolve the plaintiff from liability. First, the change of position defence depends on C providing value for the property. However, in certain Torrens jurisdictions, indefeasibility of title is conferred on volunteers.[166] Hence, the argument that change of position will always exclude restitutionary liability breaks down in those jurisdictions. Secondly, the change of position may not work in every

163 The reference to unconscionable dealings is to established categories such as the case of *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. As argued above in this Part, vague assertions of unconscionability on the registered proprietor's part should not be part of the in personam exception.

164 See Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution', above n 25, 130. For support of this argument, see Moore, 'Equity, Restitution and In Personam Claims under the Torrens System' (Pt 2), above n 25; Edelman and Bant, above n 25, 352–5.

165 See *Frazer v Walker* [1967] 1 AC 569; *Garofano* (1992) NSW ConvR ¶55–640; *Vassos* [1993] 2 VR 316.

166 See above n 98.

situation. One of the fundamental elements of the defence is that the change of position must be made in good faith.[167] There will inevitably be the temptation to analyse good faith based on whether C had knowledge of the fraud or forgery.[168] Such an analysis would be sailing too close to the wind of actual or constructive notice which is an anathema to Torrens jurisprudence.

However, it should be pointed out that a claim against a registered proprietor based on mistake or failure of consideration is possible in certain circumstances, especially in two-party cases. Suppose A transfers registered land to B pursuant to a contract. The contract is then found to be vitiated by reason of a mistake or failure of consideration. In these circumstances, A should be able to set aside the transfer of the property or to ask for restitution of the value of the land transferred.[169] Such a claim does not threaten the principle of indefeasibility as A is exercising their contractual right to set aside the transaction. Just as it is unobjectionable to ask the court to enforce a valid and binding contract against a registered proprietor, it is also similarly unobjectionable, as in this case, to assert the legal consequences of a vitiating factor to the underlying contract which led to the transfer of the land.

VIII CONCLUSION

Commentators in many Torrens jurisdictions have long lamented that the scope of the in personam exception has yet to be fully explored.[170] In this article, I have attempted to address this concern and flesh out a framework in which to analyse the in personam exception. To recap, the salient features of the framework are as follows: (1) the prima facie position is that personal claims which are known in law or equity may be brought against the registered proprietor unless these claims directly or indirectly detract from the principle of indefeasibility; (2) the personal claims must arise from the conduct of the registered proprietor, which must amount to something more than merely becoming the new registered proprietor; (3) the claims against the registered proprietor may have a personal or proprietary consequence; (4) the courts should move away from analysing the in personam exception using vague notions of unconscionability; and (5) in limited cases where there are very strong policy reasons, a personal claim should be allowed even if it does detract from the principle of indefeasibility. The main challenge is to determine which kinds of personal claims, if allowed, would substantively undermine the principle of indefeasibility of title. Finally, in

167 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 384 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ). For an excellent overview of the defence, see Jessica Palmer, 'Chasing a Will-o'-the-Wisp? Making Sense of Bad Faith and Wrongdoers in Change of Position' [2005] *Restitution Law Review* 53.

168 See, eg, Susan Barkehall-Thomas, 'Change of Position, Good Faith and Unconscionability' in Michael Bryan (ed), *Private Law in Theory and Practice* (2007) 289. See also Tang Hang Wu, 'The Role of Negligence and Non-Financial Detriment in the Law of Unjust Enrichment' [2006] *Restitution Law Review* 55.

169 See *Tutt v Doyle* (1997) 42 NSWLR 10. See also *Minister for Education and Training v Canham* (2004) NSW ConvR ¶56-080, where a retransfer was ordered because the defendant knew of the plaintiff's mistake in conveying more land than was contractually bargained for.

170 See, eg, Stevens, above n 85. See also Crown, 'Equity Trumps the Torrens System', above n 14, 415, where the in personam exception is described as inherently vague.

certain circumstances such as the facts presented in the case of *Garcia*,[171] the public policy reasons to allowing the claim is so strong that the courts may favour this interest over the principle of indefeasibility of title. It has not been possible in this article to analyse *all* forms of personal claims which may be brought against the registered proprietor. Nevertheless, it is suggested that the framework set out in this article would provide a principled starting point in analysing the ambit of the in personam exception.

[171] (1998) 194 CLR 395.